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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

RTT CORPORATION, an Oregon corporation, doing business as Rocky Mountain Products,

Plaintiff,

v.

BRENNTAG PACIFIC, INC., a Delaware corporation,

Defendant.

Civil No.: 08-CV-6291-AA

BRENNTAG PACIFIC, INC.'S CONCISE STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to L.R. 56.1, defendant Brenntag Pacific, Inc. submits the following Concise Statement of Undisputed Material Facts in support of its Motions for Partial Summary Judgment:¹

¹ These facts are undisputed for purposes of Brenntag's motion for partial summary judgment only.

1. Brenntag is a distributor of chemical products, including sorbitol. (Brenntag's Answer, ¶ 4.) Its principal place of business is in California. (*Id.*, ¶ 2.)

2. From May 2007 through March 2008, Brenntag sold sorbitol to RTT that was manufactured by PT Sorini and supplied to Brenntag (hereinafter referred to as the "Meelunie sorbitol"). The Meelunie sorbitol is referenced as product #817922 or product #722275 on each invoice. (Affidavit of Sam DeBellis, Jr., ¶ 3.) An original invoice for each sale was provided to RTT at or about the time of each sale of sorbitol. (*Id.*, ¶ 4.)

3. Copies of Brenntag's invoices for the sales of the Meelunie sorbitol to RTT are attached to the Affidavit of Same DeBellis, Jr. as Exhibit A. (*Id.*)

4. The Brenntag invoice is a two-sided document that contains Brenntag's Terms and Conditions on the back side of the document. These Terms and Conditions are the contractual terms and conditions that governed and controlled Brenntag's sale of products, including the Meelunie sorbitol, to RTT. No other contractual terms and conditions existed between Brenntag and RTT and the Terms and Conditions were not changed in any way during the period when Brenntag sold the Meelunie sorbitol to RTT. (*Id.*, ¶ 5.)

5. Brenntag also provided RTT with a Bill of Lading with each shipment of product(s) to RTT. (*Id.*, ¶ 6.)

6. Brenntag's Bill of Lading is a two page document. The second page is a two-sided customer copy that contains the same Terms and Conditions that appear on the back side of Brenntag's invoices. (*Id.*, ¶ 7.)

7. At the time of each delivery of the Meelunie sorbitol, a representative of RTT signed the Bill of Lading expressly acknowledging the following:

"Purchaser's acceptance of the goods covered by this document shall constitute acceptance by the Purchaser of all Terms and Conditions of sale stated on the reverse side hereof."

(*Id.*, ¶ 8.)

8. After the Bill of Lading was signed by an RTT representative, the customer copy, which is the second page of the Bill of Lading with the Terms and Conditions on the reverse side, was given to RTT. (*Id.*, ¶ 9.)

9. Copies of the Bill of Lading face sheet of each sale of Meelunie sorbitol to RTT during the period of May 2007 through March 2008 are attached to the Affidavit of Same DeBellis, Jr. as Exhibit B.

10. An Example of the Terms and Conditions that appear on the reverse side of the second page of the Brenntag Bill of Lading is attached to the Affidavit of Same DeBellis, Jr. as Exhibit C.

11. The Terms and Conditions contain a Limitations of Liability provision, which provides as follows:

6. LIMITATIONS OF LIABILITY

a. PURCHASER HEREBY WAIVES ANY CLAIM AGAINST SELLER FOR CONSEQUENTIAL DAMAGES, LOSS OR FOR DAMAGE TO GOODWILL OR ANY OTHER SPECIAL, DIRECT, INDIRECT OR INCIDENTAL DAMAGES, EVEN IF SELLER HAS BEEN ADVISED OF OR HAS NOTICE OF THE POSSIBILITY OF SUCH DAMAGES AND PURCHASER'S EXCLUSIVE REMEDY WITH RESPECT TO ANY CLAIM, WHETHER IN CONTRACT, TORT OR STRICT LIABILITY OR OTHERWISE, IN RESPECT OF THE PRODUCTS SOLD HEREUNDER SHALL BE EXPRESSLY LIMITED TO THE AMOUNT OF THE PURCHASE PRICE OF SUCH PRODUCT OR THE REPLACEMENT OF SUCH PRODUCT.

b. FAILURE OF PURCHASER TO GIVE WRITTEN NOTICE OF SUCH CLAIM TO SELLER WITHIN 30 DAYS FROM THE DATE OF DELIVERY OF SUCH PRODUCT SHALL CONSTITUTE A WAIVER BY PURCHASER OF ALL CLAIMS IN RESPECT OF SUCH PRODUCT. NO PRODUCT SOLD HEREUNDER SHALL BE RETURNED TO THE SELLER WITHOUT SELLER'S PERMISSION. NO CLAIM SHALL BE ALLOWABLE AFTER ANY SUCH PRODUCT HAS BEEN PROCESSED IN ANY MANNER.

(Terms and Conditions, ¶¶ 6.a. and b.)

12. RTT's Complaint alleges three claims for relief: Breach of Contract, Breach of Merchantability Warranty and Breach of Fitness for a Particular Purpose Warranty. (*See*, RTT's Complaint, generally.)

13. RTT alleges that Brenntag shipped sorbitol to RTT that was defective. (*Id.*, ¶¶ 5-7, 9.)

14. RTT alleges that by shipping defective sorbitol, Brenntag breached its contract with RTT and also breached warranties of merchantability and fitness for a particular purpose. (*Id.*, ¶¶ 13, 16, and 19.)

15. RTT further alleges that because of the defect in the sorbitol, RTT suffered financial losses of \$140,000 and will suffer further financial losses of \$1,700,000. (*Id.*, ¶¶ 11 and 14.)

DATED this 12th day of February, 2009.

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